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No. 96-1245

In the Supreme Court of the United States

OCTOBER TERM, 1996

WILLIAM A. BRANDT, JR., ETC., PETITIONER

v.

FIRST UNION CORPORATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE FEDERAL DEPOSIT INSURANCE CORPORATION IN OPPOSITION

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16 pp

QUESTION PRESENTED

Whether the court of appeals properly affirmed the dismissal of state-law litigation alleging improprieties related to the acquisition by the private respondents, in a transaction arranged by respondent the Federal Deposit Insurance Corporation, of two insolvent banks that were previously owned by petitioner's bankrupt.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-5a) is reported at 93 F.3d 750. The opinion of the district court (Pet. App. 6a-13a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on September 3, 1996. A petition for rehearing was denied on November 8, 1996. Pet. App. 16a-17a. The petition for a writ of certiorari was filed on February 5, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This action arises out of an alleged breach of contract and tortious conduct by respondents First Union Corporation and First Union National Bank, N.A. (collectively, First Union) in their dealings with Southeast Bank, N.A., and Southeast Bank of West Florida (collectively, the Southeast Banks) and the Banks' former holding company, Southeast Banking Corporation (SBC). Pet. App. 18a-19a. First Union acquired certain assets (and assumed certain liabilities) of the Southeast Banks after federal and state regulators placed the Banks into receivership in September, 1991. *Id.* at 31a. Petitioner is SBC's trustee in bankruptcy. *Id.* at 19a.

1. Petitioner's complaint against First Union acknowledges that by March, 1991, the Southeast Banks had suffered widely publicized losses and had a significant portfolio of non-performing loans. Pet. App. 21a.[1] SBC therefore began exploring the possibility of consolidation with another institution. Overtures were made to several possible merger partners, including First Union. *Ibid.*

In March, 1991, SBC and First Union signed an Agreement under which First Union would conduct "due diligence" review of the Banks' financial status in connection with a possible merger. Pet. App. 21a-22a, 25a. The Agreement contained, among other terms, a "standstill" provision that prohibited First Union, for a period of eighteen months, from entering into any discussions, negotiations, arrangements or

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[1] Because the complaint was dismissed under Fed. R. Civ. P. 12(b)(6), the statement of facts is based on the allegations of the complaint. See, *e.g.*, *Leatherman* v. *Tarrant County Narcotics Intel. & Coord. Unit*, 507 U.S. 163, 164 (1993).

understandings with any third party with respect to confidential information obtained about SBC. *Id.* at 23a; see also C.A. R. E., Complaint Exh. A, at 6351943. The Agreement specifically provided, however, that those restrictions would not apply to discussions related to "federally assisted regulatory transactions." Pet. App. 23a; see also C.A. R. E., Complaint Exh. A, at 6351944. The Agreement also prohibited First Union from making "any public disclosure concerning the subject matter of this [agreement] * * * including that information has been provided to you or that you are having or have had discussions or negotiations." *Id.* at 6351994; see also Pet. App. 22a.

The Complaint alleges that First Union used confidential information obtained from the Southeast Banks under the Agreement in meetings with various bank regulators, including the Comptroller of the Currency (OCC), the Board of Governors of the Federal Reserve (Federal Reserve), and respondent the Federal Deposit Insurance Corporation (FDIC). Pet. App. 23a-31a. First Union allegedly used those discussions to thwart the Banks' efforts to sell various branches and to securitize a portion of their credit card portfolio, and to persuade the regulators to close the Banks so that First Union could purchase their assets for less than it would have had to pay in a transaction negotiated directly with the Banks and SBC. *Id.* at 23a, 28a. The Complaint further alleges that First Union made various public statements prohibited by the Agreement, in an attempt to hasten the collapse of the Southeast Banks by undermining the confidence of depositors. *Id.* at 27a.

In July, 1991, the Southeast Banks began to borrow funds from the Federal Reserve to maintain adequate liquidity. Pet. App. 30a. The following month, the

FDIC began seeking competitive bids for the sale of the banks, and First Union was again allowed to review the banks' records for purposes of preparing a bid. *Ibid.* On September 19, 1991, the Federal Reserve called for immediate repayment of approximately $550 millon in borrowings by the Southeast Banks. *Id.* at 31a. When the Banks were unable to pay, the OCC and Florida bank regulators appointed the FDIC as receiver for the banks. *Ibid.* The FDIC, acting both as receiver and as insurer of the Banks' deposits, then entered into an assistance agreement under which First Union acquired substantially all of the Banks' assets. *Ibid.*

2. Petitioner sued First Union in state court, alleging that First Union's conduct leading up to the closure of the Southeast Banks breached various contractual and other duties owed by First Union under state law. See Pet. App. 33a-50a. First Union removed the action to the United States Bankruptcy Court for the Southern District of Florida. The FDIC, acting in its corporate capacity as provider of deposit insurance, intervened under Fed. R. Civ. P. 24(c). Pet. App. 3a.[2] The reference to the bankruptcy court was later withdrawn, and the action proceeded in the district court.

The district court dismissed all of petitioner's claims. Pet. App. 6a-13a. With respect to all but Count II of the Complaint, the court concluded that

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[2] First Union then filed a third-party complaint against the FDIC seeking indemnification in the event that First Union was found liable to petitioner. The district court struck that complaint on the ground that First Union's agreement with the FDIC did not require indemnification for any act or omission that took place before the regulatory closure of the Southeast Banks.

petitioner lacked standing to sue under state law, because his claims as trustee for SBC were merely derivative of claims belonging to the Southeast Banks, and therefore to the FDIC as receiver. *Id.* at 9a-12a. The court dismissed Count II, which alleged that First Union had breached a duty owed directly to SBC under the "standstill" provision, because it held that all of First Union's communications with federal regulators were permitted under the aforementioned exception to the standstill provision for "federally assisted regulatory transactions." *Id.* at 12a.

The court of appeals affirmed. Pet. App. 1a-5a. In a brief per curiam opinion, the court held that SBC's "injury, if any, was the result of the Comptroller of the Currency's decision to close Southeast Bank." *Id.* at 3a-4a. The court noted petitioner's allegation "that because of First Union's prompting the government officials decided to close the bank[s] sooner than otherwise would have occurred," but it found that "underlying this claim (and throughout [petitioner's] complaint) is [petitioner's] belief that [the] Southeast Bank[s] [were] solvent and should not have been closed by federal regulators." *Id.* at 4a. The court concluded that "[t]he Comptroller's decision [to close the banks] is not an act for which First Union can be held liable" (*ibid.*), and similarly that petitioner could not "sue First Union for 'precipitating' the government's ultimate action by disclosing information the government was entitled to have" (*id.* at 5a).

ARGUMENT

It is undisputed that in 1991 the Southeast Banks had suffered well publicized losses, had a significant portfolio of non-performing loans, and were facing serious liquidity problems. See, *e.g.*, Pet. App. 21a,

30a. Under those circumstances, both SBC and the FDIC—which, as the insurer of the Banks' deposits, had a significant interest in their financial stability—began to discuss with various other parties, including respondent First Union, the possibility of a "merger or other consolidation transaction" involving the Banks. *Id.* at 21a, 24a. Petitioner's original complaint (*id.* at 18a-51a) alleged that First Union breached an agreement with SBC and violated a variety of other state-law duties by engaging in such discussions with the FDIC. The FDIC intervened in the litigation between petitioner and First Union because the outcome had the potential to influence the terms and conditions under which financially sound institutions would be willing to discuss with the FDIC the sort of transactions that the FDIC often seeks to arrange in order to protect the federal deposit insurance fund.[3]

1. The federal interest in this litigation was adequately vindicated when the district court dismissed petitioner's complaint on state-law grounds. Petitioner does not dispute that, under 12 U.S.C. 1821(d)(2)(A)(1), the FDIC has the exclusive right to assert derivative claims on behalf of any institution for which it has been appointed receiver. See Pet. App. 10a; see also *O'Melveny & Myers* v. *FDIC*, 512 U.S. 79, 86 (1994). The district court concluded that, as a matter of Florida law, all but one of petitioner's claims as the former sole shareholder of the

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[3] Those transactions include both "open-bank" assistance transactions, which are designed to prevent bank failures, and "closed-bank" transactions, which are designed to resolve bank failures quickly and efficiently and thereby to maintain depositor confidence when insured depository institutions fail.

Southeast Banks were derivative of direct claims belonging to the Banks themselves, and therefore now to the FDIC as receiver. Pet. App. 9a-12a. Similarly, the court dismissed Count II of the complaint, which alleged that First Union breached the "standstill" provision of the Agreement through its various contacts with the FDIC (*id.* at 34a-36a), on the ground that the standstill provision contained an explicit exception for "federally assisted regulatory transactions" of the sort that occurred in this case. *Id.* at 12a; see C.A. R. E., Complaint Exh. A, at 6351943-6351944.

Petitioner has not challenged the district court's fact-bound state-law holdings in this Court (see Pet. i), and they are sufficient to support the judgment below dismissing the Complaint.

2. Petitioner contends (Pet. 7-26) that the court of appeals in this case engaged in "intemperate use of the federal common lawmaking power," creating a "blunt tool" that promises to "cut a wide swath across the judicial landscape." Pet. 25. That argument overreads the court's opinion.

The FDIC argued to the court of appeals that the district court had correctly held petitioner's claims to be derivative (FDIC C.A. Br. 11-15), and that that result was consistent with the federal statutory scheme for orderly resolution of all claims by and against a failed institution (*id.* at 15-17). The FDIC argued further that petitioner could not show that First Union's actions were the "proximate cause" (*id.* at 18) of any harm to SBC, both because federal regulators had an independent right to any confidential information allegedly provided to them by First Union (*id.* at 18-23), and because any harm to SBC as shareholder of the Southeast Banks was caused by

the Banks' insolvency and their closure by the OCC, not by any discussions First Union may have had with the FDIC (*id.* at 23-24).

The court of appeals' decision is consistent with these limited arguments. Petitioner does not contest that the OCC and Florida officials acted properly in closing the Southeast Banks when the Banks were unable to meet their obligations to the Federal Reserve. See 12 U.S.C. 191, 1821(c)(5)(F) (OCC may appoint receiver if it determines that, among other things, an institution cannot "pay its obligations * * * in the normal course of business"). Nor does petitioner contend that the Banks' liquidity problems were caused by First Union's discussions with federal regulators. The court held only that, in the absence of some such allegation, any damage sustained by SBC was ultimately subsumed in the regulatory decision to close the Banks, for which First Union could not be held responsible.

The court also recognized (Pet. App. 5a) that any "confidential" information that First Union might be found to have disclosed to the government would be information to which federal bank regulators were entitled in any event. Both the OCC and the FDIC had a statutory right to possess, on demand, any available information regarding the condition or future prospects of the Banks.[4] That right to

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[4] The OCC is empowered to examine "all the affairs" of national banks. 12 U.S.C. 481. Bank holding companies such as SBC are regulated by the Federal Reserve, which also has broad powers. 12 U.S.C. 248(a)(1), 1844. Similarly, the FDIC is authorized to examine any insured depository institution whenever it determines that a special examination is necessary. 12 U.S.C. 1820(c)(3). The FDIC has also been granted broad authority to take testimony and issue subpoenas in connection

information is critical to the FDIC's ability to discharge its statutory mandate (see 12 U.S.C. 1823(c)) to arrange for the resolution of failed or failing insured depository institutions in an orderly and cost-effective manner. The court of appeals' holding is therefore consistent with the argument, advanced below by both First Union and the FDIC, that any contract provision that would have prevented First Union from discussing the financial condition of the Banks with federal regulators would have been void under Florida law as against public policy. See FDIC C.A. Br. 18-23; First Union C.A. Br. 28-33; *City of Hialeah Gardens* v. *John L Adams & Co.*, 599 So. 2d 1322, 1323-1324 (Fla. Dist. Ct. App. 1992); *Title & Trust Co.* v. *Parker*, 468 So. 2d 520, 524 (Fla. Dist. Ct. App. 1985); Restatement (Second) of Contracts § 178 (1981); cf. *United States* v. *Chuang*, 897 F.2d 646 (2d Cir.) (no expectation of privacy in bank documents

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with "examination of insured depository institutions" regarding "any matter in respect to the affairs or ownership of any such bank or institution or affiliate thereof." 12 U.S.C. 1820(c). Moreover, Congress has provided that the FDIC may, with the consent of the other government body involved, "avail itself of the use of information, services, and facilities" of "any Federal Reserve Bank or of any board, commission, independent establishment, or executive department of the Government." 12 U.S.C. 1820(a). The OCC's regulations contemplate the sharing of information regarding national banks with the FDIC (12 C.F.R. 4.18(b)), in order to assist the FDIC in carrying out its statutory mandate to insure banks and resolve failures. The FDIC has promulgated regulations that facilitate the sharing of information in its possession with the OCC and other federal regulators. 12 C.F.R. 309.6(c)(3) (1994). FDIC regulations require confidential treatment of proprietary commercial or financial information that comes into its possession. 12 C.F.R. 309.6(c)(4) (1994).

where OCC could examine affairs of bank at any time), cert. denied, 498 U.S. 824 (1990). Equally important, the court's observation concerning the government's right to information is consistent with its broader holding that First Union's alleged violations of confidence could not have been the legal cause of bank closures ordered by independent regulatory agencies on the basis of information that those agencies were statutorily entitled to have.

The court of appeals' holding, after full briefing, that petitioner's complaint alleged no actionable causal relationship between First Union's alleged actions and the decision of federal and state regulators to close two failing banks is an application of causation principles common to state tort and contract law.[5] The court's citation of *FDIC* v. *Irwin*, 916 F.2d 1051, 1055 (5th Cir. 1990), does not change that conclusion. *Irwin* held that the OCC's decision to close a bank was generally immune from challenge under the Federal Tort Claims Act. In this case, however, the court's quotation from *Irwin* makes clear that it cited the case only to support its deter-

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[5] Even if petitioner could identify some distinct element of damage that would not have occurred but for First Union's alleged conduct, the court was entitled to conclude that there was no proximate causation under Florida law. Such a determination necessarily involves considerations of public policy. See, *e.g.*, 3 S. Speiser, C. Krause & A. Gans, *The American Law of Torts* § 11:1, at 380-381 (1986), citing *Zamora* v. *Columbia Broadcasting System*, 480 F. Supp. 199, 201 (S.D. Fla. 1979) (applying Florida law); 2 F. Harper & F. James, *The Law of Torts* § 20.4, at 1132 (1956). And in considering the policy of state law, the court could properly take into account the public interests served by free communication with federal, as well as state, banking authorities. Cf. *O'Melveny & Myers* v. *FDIC*, 512 U.S. at 90-91 (concurring opinion).

mination that the OCC's decision to place the Banks in receivership acted as an intervening superseding cause of the ultimate harm to SBC, breaking any chain by which First Union's alleged discussions with the FDIC might otherwise have been linked to some prior (and presumably lesser) harm to SBC as sole stockholder of the Banks. See FDIC C.A. Br. 23 (citing *Irwin*, and the passage quoted by the court, in arguing that the "fundamental problem" with petitioner's case is "the lack of a causative link between the alleged actions of First Union and the alleged harm to the shareholder."). The court's judgment thus rests on familiar state tort and contract law causation principles, not on the announcement of any sweeping new rule of "federal common law."[6]

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[6] If state law were insufficient to protect the federal interest in promoting depositor confidence and assuring the integrity of the nation's financial system, a federal common-law rule of decision in this area might be appropriate. See, *e.g.*, *Atherton* v. *FDIC*, 117 S. Ct. 666, 670 (1997), citing *Wheeldin* v. *Wheeler*, 373 U.S. 647, 651 (1963). That issue does not arise so long as state law is adequate to protect the federal interest.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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